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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 75-1628

MARILYN THRELKELD, *et al.*,

Appellants,

v.

ROBBINSDALE FEDERATION OF TEACHERS, LOCAL 872,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MINNESOTA

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO VACATE AND REMAND

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APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO VACATE AND REMAND

Appellants Marilyn Threlkeld and Daniel Hanka (hereinafter the "Teachers") file this brief in opposition to the motion of appellee Local 872, Robbinsdale Federation of Teachers, and the brief *amicus curiae* of the State of Minnesota, which urge this Court not to hear the Teachers' appeal.

ARGUMENT

Appellee Local 872 has moved this Court to vacate the judgment of the Minnesota Supreme Court and remand with instructions that the appellant Teachers be permitted to amend their complaint to reflect the recent amendment of Minn. Stat. §179.65, subd. 2, the statutory provision in issue here. Local 872 contends that the statutory amendment renders moot any need for declaratory relief in this case. Motion at 2, *citing Diffenderfer* v. *Central Baptist Church,* 404 U.S. 412 (1972); *see* Brief *Amicus Curiae* Raising a Question of Mootness for the State of Minnesota at 10. This contention is without merit, for two reasons: I. The disposition of monies caused to be seized from the Teachers by Local 872 under color of Minn. Stat. § 179.65, subd. 2, prior to its amendment, and now held in an escrow account, turns upon the constitutionality of that seizure under the statute which purported to authorize it, and not upon the constitutionality of seizures which might be made in the future under color of the statute as subsequently amended. II. The amendment of Minn. Stat. § 179.65, subd. 2, has in no way altered the issues of notice and prior hearing under the Fourteenth Amendment which the Teachers raised in their Jurisdictional Statement, since the amendment merely embodies in explicit terms the unconstitutional notice–and hearing-procedures read into the statute by the Minnesota Supreme Court in the decision here on appeal.

I.

The Teachers' appeal presents a live controversy over the possession of "fair-share" fees now held in escrow, which this Court can and should resolve.

The Teachers' amended complaint sought, *inter alia,* a declaratory judgment that the original "fair-share" wage-garnishment scheme is repugnant, on its face and as applied, to the Due Process Clause of the Fourteenth Amendment. Juris. Statement at 8. Shortly after filing the complaint the Teachers entered into an escrow agreement with Local 872. App. A, attached hereto. By the terms of this agreement, all "fair-share" fees were to be, and in fact have been, withheld from the Teachers' earnings by their employer and deposited in a specified account–where they shall remain until "a final judicial determination has been made regarding the issues in the declaratory judgment action, and a court order entered relating to that determination* * *." App. A at 4a. The existence of this agreement, now in full force, precludes a finding of mootness here.

The facts of *Powell* v. *McCormack,* 395 U.S. 486 (1969), are strikingly similar to those presented in this appeal. Powell sought a declaratory judgment that his exclusion from the House of Representatives, 90th Congress, was unconstitutional; and he requested injunctive relief to compel payment of his salary. While the case was pending before this Court, the 90th Congress terminated; the 91st Congress came into session; and Powell took his seat therein. Respondents then filed a suggestion of mootness, contending that the central question of Powell's complaint, the constitutionality of his exclusion from the 90th Congress, was

no longer properly in issue, since the 90th Congress had ceased to exist and Powell had been seated in the 91st. In response, Powell argued that there remained the unresolved issue of whether he was entitled to the salary withheld from him during the term of the 90th Congress. This Court agreed "that Powell's claim for back salary remains viable even though he has been seated in the 91st Congress * * *." 395 U.S. at 496 (footnote omitted); *accord, Bond* v. *Floyd,* 385 U.S. 116, 128 n.4 (1966).

The reasoning of *Powell* is fully applicable here. *Compare* 395 U.S. at 496-500, *with* Juris. Statement at 6-18. Who is entitled to possession and use of the escrowed "fair-share" fees is not an issue "wholly incidental and subordinate" to the Teachers' claim, but instead the *primary* question presented in this appeal. The party against whom the Teachers seek relief, Local 872, is identified with sufficient clarity for this Court to enter an appropriate judgment – and, indeed, is a signatory to an escrow agreement which itself testifies that the Teachers' "claim is still unresolved and hotly contested by clearly adverse parties." 395 U.S. at 498.

The amendment of Minn. Stat. § 179.65, subd. 2, has no bearing on this claim. The "fair-share" fees *now escrowed* were seized, as no one denies, without notice and *prior* hearing *under color of the unamended statute.* And the Teachers' claim is that such a seizure, depriving them of the present use and enjoyment of their wages, is repugnant to the Due Process Clause of the Fourteenth Amendment – whether or not some future seizure of *other* fees, under color of the amended statute, might also be unconstitutional. If Local 872 is entitled to the monies *now held in escrow,* it can only be because the statute *which authorized*

their seizure in 1974 and 1975 is not unconstitutional. Local 872 cannot rely upon an amendment passed *in 1976* to justify what it did many months' earlier – especially when that amendment fails to guarantee the *notice* and *pre-seizure hearing* which the Teachers claim the Due Process Clause requires under the circumstances of this case.

Therefore, the rule of *Diffenderfer* v. *Central Baptist Church,* 404 U.S. 412 (1972), upon which local 872 and *amicus* State of Minnesota rely, is neither governing nor even relevant here. In *Diffenderfer,* the only relief sought was: (i) a declaratory judgment that a Florida statute which, before its repeal, had allowed tax exemptions for church property was unconstitutional as applied to a church parking lot allegedly used for commercial purposes; and (ii) an injunction against application of the then-nonexistent provision to the lot. Quite correctly, this Court noted that the "relief is, of course, inappropriate now that the statute has been repealed." 404 U.S. at 415. For, in effect, Diffenderfer had already obtained from the Florida Legislature the relief he sought: *viz.,* the removal of the lot's tax-exempt status. Here, conversely, the Teachers have yet to obtain the relief they seek: *viz.,* return of the "fair-share" fees unconstitutionally seized for the benefit of Local 872. Quite the contrary. The Minnesota Legislature has now explicitly enacted into Minn. Stat. § 179.65, subd. 2, the very procedure for "fair-share" seizures which the Teachers have argued all along is repugnant to the Due Process Clause of the Fourteenth Amendment.

II.

The amendment to the "fair-share" provision has exacerbated, not mitigated or mooted, the constitutional infirmities of the wage-garnishment scheme.

The recent amendment of Minn. Stat. § 179.65, subd. 2, far from rendering moot the constitutional issue now before this Court, explicitly endorses the erroneous theory of procedural due process upon which the Minnesota Supreme Court relied in the decision from which the Teachers appeal. *Compare* Juris. Statement at 14-15, *with* Brief Amicus Curiae Raising a Question of Mootness for the State of Minnesota at 5-8. The "fair-share" provision, *as amended,* is thus (for constitutional purposes) the equivalent of the "fair-share" provision, *as construed by the Minnesota Court.*

It is true that, under the new law, no monies may be garnished from the wages of employees who are not members of the exclusive representative unless

> the exclusive representative shall provide advance written notice of the amount of the fair share fee assessment to the director [of the Bureau of Mediation Services], the employer and to a list furnished by the employer of all employees within the unit.

Minn. Stat. § 179.65, subd. 2, as amended. It is true, but irrelevant to the constitutional issue raised here. For the Teachers claim that "*constitutional* 'notice' is *not* the mere information that one is to be deprived of * * * property in fact, but rather notice *of a hearing of some kind* at which the validity of the deprivation will be put in issue." Juris. Statement at 12. The new statute does not provide for such notice.

It is also true that, under the new law, a nonunion employee may himself file a challenge to the "fair-share" assessment, and that, *if such a challenge is filed,* the fees will not be transmitted to the exclusive representative but will instead be held in escrow pending a hearing by administrative officials:

> A challenge by an employee or by a person aggrieved by the assessment shall be filed in writing with the director, the public employer, and the exclusive representative within 30 days after receipt of the written notice. All challenges shall specify those portions of the assessment challenged and the reasons therefor but the burden of proof relating to the amount of the fair share fee shall be on the exclusive representative. The employer shall deduct the fee from the earnings of the employee and transmit the fee to the exclusive representative 30 days after the written notice was provided, or, in the event a challenge is filed, the deductions for a fair share fee shall be held in escrow by the employer pending a decision by the director * * *.

Minn. Stat. § 179.65, subd. 2, as amended. True, but (again) irrelevant to the constitutional issue. For the Teachers claim that a *constitutional* hearing must be *initiated by Local 872,* and must *precede* the seizure of their wages. Juris. Statement at 14-18.

Furthermore, the amendment of the "fair-share" provision has exacerbated the constitutional problems inherent in the old garnishment scheme *by removing the statutory standard which the old law contained.* Under the original "fair-share" law, an exclusive representative could ask only for a fee which did not

> exceed a pro rata share of the specific expenses incurred for services rendered by the representative

> in relationship to negotiations and administrative of grievance procedures.

Minn. Stat. § 179.65, subd. 2 (1974). Now, the "fair-shair" fee may be

> in an amount equal to the regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available only to members of the exclusive representative, but in no event shall the fee exceed 85 percent of the regular membership dues.

Minn. Stat. § 179.65, subd. 2, as amended. The Minnesota Legislature has thus seen fit to dispense with even the pretense that the fees serve to defray expenses of the exclusive representative in relation to "collective bargaining", and only in relation to "collective bargaining". This makes even more pressing the due-process issue of "benefit" which the Minnesota Supreme Court begged when it upheld the old law. *See* Juris. Statement, App. B at 11b, *and compare with, e.g., Browning* v. *Hooper,* 269 U.S. 396 (1926).

The "fair-share" amendment, then, has in no way mooted the basic procedural-due-process issues of notice, hearing, and benefit raised in the Minnesota courts and now properly here on appeal. *See, e.g., Panama Refining Co.* v. *Ryan,* 293 U.S. 388, 413-14 (1935) (and cases there cited).

CONCLUSION

This court should note probable jurisdiction of the Teachers' appeal.

Respectfully submitted,

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APPENDIX A

Escrow Agreement Between the Teachers and Local 872 dated 18 December, 1974

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT

The Robbinsdale Education Association, Marilyn Threlkeld, an individual, and Daniel Hanka, an individual,

Plaintiffs,

v. *ESCROW AGREEMENT*

The Robbinsdale Federation of Teachers, Local 872, and Independent School District 281,

Defendants.

THIS ESCROW AGREEMENT, made and entered into on this 18th day of December, 1974, by and between The Robbinsdale Education Association (hereinafter "Association"), Marilyn Threlkeld, (hereinafter "Threlkeld") and Daniel Hanka, (hereinafter "Hanka") plaintiffs in the above-entitled action, The Robbinsdale Federation of Teachers, Local 872 (hereinafter "Federation"), and Independent School District 281 (hereinafter "District"), defendants in the above-entitled action;

WITNESSETH:

WHEREAS, the Association, Threlkeld and Hanka are parties plaintiff, and the Federation and the District, parties defendant, in a declaratory judgment action brought in Hennepin County District Court for the purposes of determining the construction and validity of Minnesota Statutes §179.65(2), and for other relief, and

WHEREAS, the Federation is the certified exclusive representative of certain employees of defendant District, and,

WHEREAS, defendant District is the public employer of Threlkeld and Hanka, and of the members of the Association and of the members of the Federation, and,

WHEREAS, the plaintiffs are public employees of defendant District but are not members of the defendant Federation, and

WHEREAS, M.S.A. §179.65(2) authorized the Federation to require all public employees who are not members of the exclusive representative to contribute a fair share fee for services rendered by the exclusive representative in relationship to negotiations and administration of grievance procedures and further authorizes the exclusive representative to notify the employer of said public employees of its requirement and further authorizes said employer to check off from the earnings of said public employees the fair share contribution required by the exclusive bargaining agent and further authorizes the employer to transmit the amounts checked off to the exclusive bargaining agent, and

WHEREAS, the defendant Federation is now requiring, and defendant District is checking off, a fair share

contribution from the earnings of plaintiff Threlkeld, and the defendant Federation further proposes to require all other plaintiffs above named to contribute a fair share fee as of January 1, 1975, and,

WHEREAS, defendant District is obligated pursuant to M.S.A. §179.65(2) to check off the fair share contribution required or proposed to be required by defendant Federation and transmit the contributions to the Federation, and

WHEREAS, the validity of the required check off procedure described herein above is the essence of the controversy in the declaratory judgment action, and the determination of the amount to be checked off is the essence of the declaratory judgment action;

NOW, THEREFORE, it is hereby agreed that the statutory procedure as set out in these premises shall, as to the parties to the declaratory judgment action, be modified according to the terms of this agreement.

1. After this date, the defendant District shall check off from the earnings of the above named plaintiffs the fair share contribution required by the defendant Federation.

2. The District shall transmit the contributions checked off by it to an escrow savings account established at the Guarantee State Bank of Robbinsdale, 3700 West Broadway, Robbinsdale, Minneosta, signatories of which shall be Darel F. Swenson, 210 First National Bank Building, Wayzata, Minnesota, attorney for plaintiffs Association, Threlkeld, and Hanka, and Roger A. Peterson, 700 Title Insurance Building, Minneapolis, Minnesota, attorney for defendant Federation, who shall hold as escrow agents the fair share contributions deposited in said account according to the terms of this agreement. Upon transmission of the

checked off contributions to said bank, the District shall be relieved of any further obligation or responsibility relating to said contributions.

3. During the pendency of the declaratory judgment action referred to herein, under no circumstances shall the defendant District transmit the checked off contributions to the defendant Federation.

4. Within seven (7) days after this date, defendant Federation will transmit all fair share contributions deposited and currently in the Federation Fair Share account Guarantee State Bank of Robbinsdale, to the escrow savings account described in paragraph 2, hereinabove. Further, any fair share contributions received by the defendant Federation from a source other than the District transmitted to said Federation by or on behalf of any named or represented plaintiff, shall, within 7 days of receipt by the Federation, be transmitted to the escrow savings account described in paragraph 2 hereinabove.

5. The escrow agents shall not under any circumstances release the contributions deposited in the escrow account except upon their mutual written authorization signed by both such agents. Such mutual authorization must be granted after a final judicial determination has been made regarding the issues in the declaratory judgment action, and a court order entered relating to that determination, or congressional or legislative determination, or prior dismissal upon mutual agreement.

6. Upon execution of the mutual authorization referred to hereinabove, the contribution deposited in the escrow account shall be released by the escrow agents according to the following terms.

(a) In the event the final judgment and order in the declaratory judgment action favors the defendant Federation, the escrow agents shall release the contributions to said Federation.

(b) In the event the final judgment and order in the declaratory judgment action favors the plaintiffs, the escrow agents shall release the contributions as follows:

(1) One check shall be issued to the then president of the Association in an amount equal to the total of all contributions deposited in the escrow account from the earnings of the members of the Association.

(2) A second check shall be issued to plaintiff Hanka in an amount equal to the total of the contributions deposited in the escrow account from the earnings of Daniel Hanka and all employees of defendant District who are teachers but who are not members of any employee organization.

(3) A third check shall be issued to plaintiff Threlkeld, in an amount equal to the total of the contributions checked off from the earnings of these non-professional public employees who are not members of any employee organization.

Dated: Dec. 18, 1975

/s/ Bernard G. Zimpfer
Bernard G. Zimpfer
Attorney for defendant
Independent School
District 281

/s/ Roger A. Peterson
Roger A. Peterson
Attorney for defendant
Robbinsdale Federation of
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